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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-225

WILLIAM KIRALY,
Petitioner

vs

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court Of Appeals
For The Sixth Circuit

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October Term, 1971

No. .....

WILLIAM KIRALY,
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vs

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

To The United States Court Of Appeals For The Sixth Circuit

Petitioner, William Kiraly, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 14, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears at the Appendix hereto. Opinions of the district court denying Petitioner's motion to dismiss the indictment and motion for new trial, both of which are unreported, appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 14, 1971. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 USC § 1254 (1).

Questions Presented

(1) Whether allegation and proof that a defendant had knowledge of a federal officer's official capacity and of the fact that the officer was engaged in the performance of his official duties are essential to indictment and conviction on a charge of violating 18 USC § 111 (Assaulting a Federal Officer Engaged in the Performance of His Official Duties)?

(2) Where the defense requests, before a jury has been empaneled, that the Government be barred from employing evidence of a defendant's 30-year-old convictions to impeach the defendant's credibility in a case in which the defendant's testimony is critical to the determination of the factual issues raised by a criminal charge, is it error to deny the defense request without balancing all considerations relevant to the admissibility of the impeaching evidence?

(3) Where a particularized need is demonstrated at trial for production of the transcript of a witness's grand jury testimony, but the trial court is rendered powerless to grant production by reason of the fact that no record of the witness's grand jury testimony was kept or prepared, must a timely motion to strike the trial testimony of the witness be granted?

(4) Where federal officers enter a home without legal process and solely on the basis of the homeowner's consent, are such officers engaged in the performance of their official duties, within the meaning of 18 USC § 111, when they fail to respond within a reasonable time to the homeowner's instruction to leave the premises?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 18:

§ 111. *Assaulting, resisting, or impeding certain officers or employees*

Whoever forcibly resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts, uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

UNITED STATES CODE, TITLE 28:

§ 753. *Reporters*

Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

* * *

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

STATEMENT OF THE CASE

In a two-count indictment filed in the United States District Court for the Northern District of Ohio, Eastern

Division, Petitioner was charged with violations of 18 USC § 111 which allegedly occurred on October 1, 1968. Count I of the indictment charged that Petitioner had assaulted an agent of the Federal Bureau of Investigation while the agent was engaged in the performance of his official duties. Count II alleged an assault upon two agents of the FBI and further charged that the assault had been committed with a deadly and dangerous weapon.[1] Neither count of the indictment charged that Petitioner knew that the officers allegedly assaulted were federal officers, nor did they allege that he knew the officers were engaged in the performance of their official duties.

A motion to dismiss the indictment for failure to charge knowledge of these facts was denied, by order filed May 6, 1970, with the following observation:

> Although there are cases to the contrary, the recent cases which have interpreted and applied 18 USC § 111 have held that knowledge or scienter are not required in order to charge a crime under the above statute.[2]

Trial commenced on June 2, 1970. During the voir dire examination of prospective jurors, defense counsel advised the court that Petitioner had been convicted on two separate felony charges in 1939 and 1940. He asked "that the Government be barred from asking Mr. Kiraly [Petitioner] on cross-examination whether he had previously been convicted of the offenses" which had been mentioned.[3] The Government opposed the request and the

1. (A. 5) ((A.) refers to the pages of the Appendix filed in the United States Court of Appeals for the Sixth Circuit.)

2. (App. 20-21).

3. (Tr. I 56) ((Tr. I) is used herein to designate the transcript of the voir dire examination of prospective jurors, which transcript is separate from the transcript of the remainder of the trial proceedings.)

court held that "the nature of the prior convictions, considered in light of the nature of the instant charge for which the defendant is on trial, are of such nature as to render evidence of prior convictions relevant to the issue of the defendant's credibility, and for that reason the Court respectfully denies the request of the defense."[4] Petitioner subsequently testified at trial that he had been convicted of breaking and entering in 1939 and armed robbery in 1940.[5]

At trial, the Government called only two witnesses — the FBI agents whom Petitioner had allegedly assaulted on October 1, 1968. During examination of one of the FBI agents, defense counsel moved for production of the grand jury minutes of the witness's testimony.[6] Government counsel announced that he "was informed there were no minutes taken at the grand jury."[7] The court declared that the unavailability of a transcript of the grand jury proceedings "rendered moot" the request for production. Explaining its ruling, the court stated:

> In making such a ruling that the request is moot because of the unavailability of the grand jury minutes, I want the record to reflect that I feel it is the better policy to have at all grand jury proceedings a court reporter present and that all testimony of witnesses before the grand jury be recorded so that in a proper case a request for production can be granted.
>
> I am mindful, however, that there is no statutory requirement that grand jury proceedings be recorded. Nonetheless, because the courts have held under proper circumstances that grand jury minutes are subject

4. (Tr. I 57)

5. (A. 76)

6. (A. 44)

7. (A. 45)

to production, that in a proper case the production can only be accomplished if a record is kept.[8]

Defense counsel moved to strike the trial testimony of the witness whose grand jury testimony was unavailable on the ground that the failure to keep a stenographic record of grand jury proceedings operated to frustrate the numerous judicial decisions holding that grand jury minutes were producible in particular circumstances.[9] In response to this motion, the court announced that "it does sympathize with the request and the basis for the request,"[10] but that the motion would be denied.[11]

The incident which gave rise to the charges against Petitioner allegedly occurred in Petitioner's home. According to the Government's witnesses, they went to Petitioner's home to question him regarding the whereabouts of a certain fugitive and they entered the home upon invitation of Petitioner's wife.[12] The principal factual disputes at trial involved whether the agents remained in Petitioner's home after being instructed to leave, and whether Petitioner drew a gun upon the agents to force them to leave. Petitioner denied that he had drawn a gun at anytime during the incident. He stated that he had gone to a cabinet in his dining room to get some medication which he regularly used to treat a serious heart ailment when he was suddenly attacked by one of the agents.[13] He also testified that he informed the agents the interview was over and asked them to leave,[14] and that after instructing

8. (A. 46)

9. (A. 46-47)

10. (A. 47)

11. (A. 48)

12. (A. 11-12, 37)

13. (A. 70-72)

14. (A. 68-69)

the agents to leave upon several occasions they remained in his home and continued to charge him with participation in various crimes and with involvement with a woman other than his wife.[15] On the basis of this testimony, defense counsel requested that

> . . . the jury be instructed that upon a determination that the officers, the agents, had been instructed to leave or were not lawfully on the premises they should reach a finding that the officers were not engaged in the performance of their official duties, that is, they could not conclude beyond a reasonable doubt that the officers were engaged in their official duties if it is found at the time of the incident that the officers were acting in an unlawful fashion by remaining on the property or refusing to leave the premises.[16]

The court denied the requested instruction with the following observation:

> The Court finds that that is not applicable law. The Court finds that a Special Agent of the Federal Bureau of Investigation, when in the performance of investigation of the criminal violations of the United States, that he does not cease in the performance of official duties if he is engaged in a trespass of one's property. Although the conduct of trespassing may be unlawful and subject him to sanctions and penalties, it, nonetheless, does not change his status from performance of his official duties to his having terminated his performance of his official duties.[17]

The District Court did instruct the jury regarding the right of the occupant of a home to use reasonable force to expel a trespasser.[18] No instruction was given, however, to the effect that an officer who willfully refuses to leave a home

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15. (A. 69-71)

16. (A. 85)

17. (A. 85)

18. (A. 82-84)

upon proper command of the occupant of the home, where the officer is in the home only by consent of the occupant, may no longer be considered to be engaged in the performance of his official duties.

The jury, after a substantial period of deliberation, acquitted Petitioner on Count I of the indictment and convicted him on Count II.

REASONS FOR GRANTING THE WRIT

I. The decision below, holding that the defendant's knowledge of a federal officer's official capacity is not an essential element of the offense defined by 18 USC § 111, raises a substantial and recurring question of federal law which has produced conflicting decisions in courts of appeals and which should be settled by this Court.

Petitioner was charged and convicted of violating 18 USC § 111 – assaulting a federal officer engaged in the performance of his official duties. Before trial and during trial, Petitioner contended that it was incumbent upon the Government to charge and prove, as an essential element of 18 USC § 111, that Petitioner knew that the officers allegedly assaulted were federal officers engaged in the performance of their official duties. That contention was rejected when a motion to dismiss the indictment for failure to state an offense was denied, when a motion for directed verdict was overruled, and when a motion for new trial was denied. The court below affirmed the judgment of the district court with the following observation:

> The statute herein involved does not on its face require proof of scienter as an element of the crime. *McNabb vs. United States,* 123 F.2d 848 (6th Cir. 1941). Inspection of this record convinces this court that there were no special facts requiring proof of scienter in this case. *Cf. United States vs. Rybicki,* 403 F.2d 599 (6th Cir. 1968). And in any event, there was ample testimony, including that of appellant himself,

that the FBI Agents identified themselves not only orally but by producing and showing their identification cards before the events which led to the instant charge.[19]

The issue raised regarding the elements of the crime of assaulting, resisting or impeding a federal officer in the performance of his official duties has concerned several courts of appeals and has produced immense confusion and conflict.[20] For example, the Fifth Circuit has dealt with the issue in a number of decisions.[21] In several cases, including *Hargett vs. United States*, 183 F.2d 859 (5th Cir. 1950), the court held that proof that the defendant knew that the person assaulted was a federal officer engaged in the performance of his official duties was essential to conviction under 18 USC § 111. In at least one other case, the same court held that 18 USC § 111 does not require proof of knowledge of the identity of the victim, without making any reference to earlier conflicting decisions.[22] Finally, in *Pipes vs. United States*, 399 F.2d 471, *rehearing denied*, 402 F.2d 271 (5th Cir. 1968), the Court of Appeals for the Fifth Circuit expressly overruled previous decisions holding that scienter was an element of 18 USC § 111. In so ruling, the court recognized that "there is authority to the contrary."[23] The Fifth Circuit was not the first to recognize the existence

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19. (App. 24).

20. See Annot., **Scienter as Element of Offense of Assaulting, Resisting or Impeding a Federal Officer,** 10 ALR3d 833 (1966).

21. *Cook vs. United States*, 117 F.2d 374 (1941); *Palmquist vs. United States*, 149 F.2d 352 (5th Cir. 1945), *cert. denied*, 326 U.S. 727; *Hargett vs. United States*, 183 F.2d 859 (5th Cir. 1950); *Carter vs. United States*, 231 F.2d 232 (5th Cir. 1956), *cert. denied*, 351 U.S. 984; *Hall vs. United States*, 235 F.2d 248 (5th Cir. 1956).

22. *Bennett vs. United States*, 285 F.2d 567 (5th Cir. 1960), *cert. denied*, 366 U.S. 911.

23. 399 F.2d at 472.

of conflict regarding this issue. In *United States vs. Chunn*, 347 F.2d 717 (4th Cir. 1965), another court observed:

> Concededly, there is a wide variance among the decisions as to whether *scienter* should be alleged and/or proved.[24]

The confusion and conflict regarding whether or not scienter is an element of 18 USC § 111 has not been limited to the Fifth Circuit. Diametrically conflicting decisions have also issued from the Fourth Circuit[25] and the Sixth Circuit.[26] The First Circuit has at least suggested that scienter is an element which must be alleged and proved,[27] while the Second Circuit has followed a relatively consistent pattern in holding that scienter is not an element of the crime.[28]

Apart from the conflict within and between courts of appeals regarding the question of whether scienter is an element of the offense of assaulting a federal officer in the performance of his official duties, anomalous and highly confusing decisions have been rendered which suggest that the question can only be resolved on examination of the

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24. 347 F.2d at 721.

25. *Owens vs. United States*, 201 F.2d 749 (4th Cir. 1953); compare *United States vs. Wallace*, 368 F.2d 537 (4th Cir. 1966).

26. *Sparks vs. United States*, 90 F.2d 61 (6th Cir. 1937); *United States vs. Rybicki*, 403 F.2d 599 (6th Cir. 1968) (dealing with 26 USC § 7212(a) – obstructing officers of the Internal Revenue Service engaged in the performance of their official duties); compare *United States vs. Kiraly*, No. 21047 (6th Cir., decided July 14, 1971).

27. *Portnoy vs. United States*, 316 F.2d 486 (1st Cir. 1963), *cert. denied*, 375 U.S. 815.

28. E.g., *United States vs. Lombardozzi*, 335 F.2d 414 (2nd Cir. 1964), *cert. denied*, 379 U.S. 914; *United States vs. Montanaro*, 362 F.2d 527 (2nd Cir. 1966); *United States vs. Heliczer*, 373 F.2d 241 (2nd Cir. 1967), *cert. denied*, 388 U.S. 917.

particular facts in each case. For example, in *United States vs. Rybicki*, 403 F.2d 599 (6th Cir. 1968), the court indicated that whether knowledge was an essential element of the offense depended upon whether the acts committed by the defendant "would have been crimes regardless of the person against whom they were committed."[29] Since that determination could be made only after the facts have emerged at trial, the *Rybicki* decision would permit no means of determining the sufficiency of an indictment in terms of whether the indictment alleged every element of the offense charged. Another court, while concluding that knowledge of the victim's official capacity was not an essential element of 18 USC § 111, added this mysterious comment:

> Knowledge that the victim was a federal official engaged in the performance of his official duties is critical at the time of trial, of course, but the underlying considerations of the Congress in the adoption of the statutes do not make such specific knowledge on the part of the defendant at the time the defendant acted an essential element of the offense.[30]

Many courts have attributed the proposition that knowledge of the victim's official capacity is an essential element of the crime defined by 18 USC § 111 to this Court's decision in *Pettibone vs. United States*, 148 U.S. 197 (1893). Indeed, *Pettibone* would appear to constitute very persuasive support for the position advanced by Petitioner and rejected by the courts below. In *Pettibone*, it was held that an indictment purporting to charge a violation of Section 5399 of the Revised Statutes of the United States was fatally defective for failure to allege the requisite scienter. The statute involved provided as follows:

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29. 403 F.2d at 601-602.

30. *United States vs. Wallace, supra*, 368 F.2d at 539.

> Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both.[31]

As is apparent, the statute did not expressly require knowledge on the part of the offender. Nonetheless, the Court found the requirement of knowledge implicit in the language of the statute:

> It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court.[32]

The result in *Pettibone* strongly suggests a proper resolution of the instant case. As in *Pettibone*, proof of knowledge of the victim's official capacity is more than a mere technical requirement implicit in 18 USC § 111. It goes to the principal objective the statutory proscription was designed to achieve – that of protecting federal officers in the performance of their official duties from interference or attack. The statute would be overbroad, applicable to conduct which no one would consider criminal, and threatening to substantial rights of citizens unless scienter is acknowledged as an element of the offense.

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31. Quoted in *Pettibone vs. United States, supra*, 148 U.S. at 197.

32. 148 U.S. at 206.

The observation of the court below that there was ample testimony to support a finding that Petitioner knew the alleged victims of the crime charged in the indictment were FBI agents does nothing to resolve the issue presented. While there was no question that the agents had identified themselves, there was substantial question as to whether or not the agents were engaged in the performance of their official duties and whether Petitioner had reasonable cause to believe they were so engaged at the time of the offense charged. Furthermore, regardless of what the testimony may have been, the issue was one which should have been resolved by a jury upon proper instruction. The issue was not presented to the jury for resolution nor was it part of the charge contained in the indictment.

II. The scope of judicial discretion in admitting, for impeachment purposes, evidence that a defendant had been convicted on criminal charges more than 30 years before the time of trial raises a substantial federal question which has not been resolved by this Court and which has led to conflicting decisions in courts of appeals.

A question which has confronted federal courts with increasing frequency in recent years relates to the power of a trial court to exclude evidence of remote criminal convictions where the government seeks to employ such convictions to impeach a defendant's testimony. Resolution of this question is critical to the achievement of some uniformity in federal courts with respect to one of the most fundamental aspects of the criminal trial process. Few decisions are more important in the defense of a criminal case than the question of whether or not the defendant will take the stand. Few considerations are more relevant to that tactical decision than the possibility that the defendant may be impeached by prior convictions. Whatever limiting instructions may be given regarding the probative value and the particularized purpose of evidence of prior

convictions, it is evident that the impact of prior convictions is apt to be very great.

Recognizing that the probable prejudicial impact of a defendant's prior convictions will often be drastically disproportionate to the legitimate probative value of such convictions, one court of appeals has expressly adopted a balancing test which requires the trial court to weigh all factors relevant to admissibility in exercising judicial discretion to admit or exclude evidence of a defendant's prior convictions.[33] The manner in which judicial discretion should be exercised has been a subject of substantial comment and investigation.[34] Whether a trial court should be invested with such discretion at all has led to conflicting decisions within circuits[35] and to conflict among circuits.[36]

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33. *Luck vs. United States*, 348 F.2d 763 (D.C. Cir. 1965).

34. See, e.g., *Hood vs. United States*, 365 F.2d 949 (D.C. Cir. 1966); *Gordon vs. United States*, 383 F.2d 936 (D.C. Cir. 1967).

35. E.g., *Shorter vs. United States*, 412 F.2d 428 (9th Cir. 1969), *cert. denied*, 396 U.S. 970 (a divided panel of the Ninth Circuit refused to adopt a balancing rule); *United States vs. Allison*, 414 F.2d 407 (9th Cir. 1969) *cert. denied*, 396 U.S. 968 (the balancing rule is favorably discussed but not clearly adopted); *Plies vs. United States*, 431 F.2d 727 (9th Cir. 1970) (court asserts that earlier decisions had rejected the *Luck* balancing test).

36. *United States vs. Hildreth*, 387 F.2d 328 (4th Cir. 1967); *United States vs. Palumbo*, 401 F.2d 270 (2nd Cir. 1968), *cert. denied*, 394 U.S. 947; *Bendelow vs. United States*, 418 F.2d 42 (5th Cir. 1969) (without mentioning the *Luck* test, the court holds that a defendant may be impeached as all other witnesses); *United States vs. Greenberg*, 419 F.2d 808 (3rd Cir. 1969) (discretionary balancing test adopted); *United States vs. Johnson*, 412 F.2d 753 (1st Cir. 1969) (balancing test apparently adopted; *Luck* cited); *United States vs. Escobedo*, 430 F.2d 14 (7th Cir. 1970) (the balancing test of *Luck* expressly rejected); and *United States vs. Scarpellino*, 431 F.2d 475 (8th Cir. 1970) (balancing test rejected).

It is difficult to determine the position of the court below with respect to the discretionary power of a trial court to exclude evidence of a defendant's prior convictions. The court states that, "under established rules of this circuit, the felony convictions were admissible."[37] In support of that proposition, the court cites *United States vs. Wade,* 364 F.2d 931 (6th Cir. 1966) — a case in which the court merely stated the general proposition that a defendant may be impeached by prior convictions once he takes the stand in his own behalf. The court does not, however, rely solely upon the established rule set forth in *United States vs. Wade, supra.* It adds the following comment:

> And, in any event, we find no abuse of discretion (*See United States vs. Palumbo,* 401 F.2d 270 (2nd Cir. 1968)) in the District Judge's ruling which could be held to be reversible error under the total facts of this case.[38]

This is the only mention which appears in any decision of the Sixth Circuit regarding the discretion of a trial court to exclude evidence of prior convictions. If such discretion does exist in the Sixth Circuit, no guidelines have been suggested as to how that discretion should be exercised. Furthermore, prior decisions of the court, presumably followed by trial courts, allow no basis for the conclusion that admission or exclusion of prior convictions is a discretionary matter. It cannot be assumed that the trial court in the instant case responded to the request for suppression of the defendant's prior convictions in a manner which reflects the intelligent exercise of judicially acknowledged discretion.

Petitioner's prior convictions were over 30 years old at the time of trial. He was 19 when he had been convicted.

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37. (App. 25).

38. (App. 25).

His sentences had expired almost 20 years before trial. His testimony at trial was critical in light of the fact that he was the only witness to the immediate events leading to indictment who was not a government agent. The issue presented is one which should not be resolved on the basis of unsupported assumptions. It relates to a question far too important to the integrity of the trial process to permit the disparate resolutions which now prevail in courts of appeals throughout the country. It is an issue which should be resolved by this Court.

III. The practice of failing to record grand jury proceedings, sanctioned by the court below, so impedes compliance with decisions of this Court establishing the right to production of grand jury minutes as to call for an exercise of this Court's power of supervision.

Petitioner's motion for production of the grand jury testimony of a trial witness was, according to the trial judge, "rendered moot" by reason of the fact that no record of the grand jury proceedings had been kept or prepared. By the simple device of not recording grand jury proceedings, the Government was thus enabled to prevent possible impeachment of a trial witness by use of testimony given before the grand jury. The decisions of this Court, establishing a defendant's right to production of a witness's grand jury testimony, may be effectively circumvented by the practice sanctioned below. In *Dennis vs. United States*, 384 U.S. 855 (1966), this Court reaffirmed and broadened the policy allowing production of grand jury minutes for purposes of testing the credibility of a witness at trial. The trial judge was entrusted with the function of "deciding whether a case has been made for production," and supervising the process of production.[39] That function could not be performed in the

39. 384 U.S. at 875.

instant case for the simple reason that grand jury minutes were not available. The whole thrust of the *Dennis* decision was thus effectively frustrated. Petitioner's motion to strike the trial testimony of the witness whose grand jury testimony was unavailable was denied. Consequently, the only sanction which might have effectively compelled compliance with the principle of *Dennis vs. United States, supra,* was rejected.

This Court, in the exercise of its supervisory jurisdiction over lower federal courts and, pursuant to the express statutory authority of 28 USC § 753, is plainly empowered to adopt a rule designed to promote fulfillment of the production requirement announced in the *Dennis* case. Section 753(b) provides, in pertinent part, that verbatim records shall be kept of all " ° ° ° proceedings as a judge of the court may direct or as may be required by rule or order of court ° ° °." At least one federal court, on the basis of 18 USC § 753(b), and pursuant to the power invested in that court by Rule 57(b) of the Federal Rules of Criminal Procedure, held that grand jury proceedings must be transcribed or otherwise effectively recorded.[40] The same rule must be adopted by this Court if the integrity of the principle announced in *Dennis vs. United States* is to be preserved.

IV. The determination of the courts below that federal officials who willfully and without legal justification refuse to leave the home of a private citizen are still acting in the performance of their official duties, within the meaning of 18 USC § 111, raises an important federal question which has led to conflicting results in courts of appeals and which has not been resolved by this Court.

At trial, the court was requested to instruct the jury that if they should find that the agents named in the

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40. *United States vs. Gramolini,* 301 F. Supp. 39, 42 (R.I. D.C. 1969).

indictment "had been instructed to leave [Petitioner's home] or were not lawfully on the premises they should reach a finding that the officers were not engaged in the performance of their official duties."[41] The instruction was denied. The jury was instructed that a citizen had the right to use reasonable force to expel an intruder or trespasser. That charge, however, did not go to the question of whether an essential element of the offense charged could be established upon evidence which demonstrated that FBI agents remained in the home of a private citizen under no colorable claim of right and after having been instructed to leave by the owner of the premises. If, upon such evidence, the jury might be justified in concluding that the agents were no longer engaged in the performance of their official duties, the instruction requested should have been given and the charge of trespassing would not constitute an adequate substitute for the requested charge. The issue raised has led to conflicting decisions in courts of appeals. In *Foster vs. United States*, 296 F.2d 65 (5th Cir. 1962), the court held that evidence tending to demonstrate that federal officers were engaged in an act of trespass at the time they were allegedly assaulted was relevant to the question of whether those officers were engaged in the performance of their official duties. It was for the jury to determine, then, whether the fact that the officers were acting unlawfully removed them from the scope of their official duties so as to render the protection afforded by 18 USC § 111 unavailable. Other courts, on the other hand, have held that the legality of the conduct of those officers described by 18 USC § 1114 is irrelevant to the question of whether their conduct was in the performance of their official duties. For example, in *Arwood vs. United States*, 134 F.2d 1007 (6th Cir. 1943), the defendant urged that the officers assaulted were not engaged in the performance of their official duties but were conducting an unreason-

41. (A. 85)

able search of the defendant's home and that "therefore the statute under which he was indicted afforded the deceased no protection." The court responded to this contention as follows:

> We cannot accept this view. We need not determine whether the deceased and his associates were unlawfully invading appellant's home or were engaged in an unreasonable search. However pertinent that inquiry might become in a prosecution of appellant for the operation of an unregistered distillery, it is not necessary to decision here. The fact remains that the entry of the deceased into the house or upon the premises and any search made there was in the course of the investigation and germane to the performance of the duties of the officers while bona fide acting under the color of authority.[42]

Other courts have also held that the illegality of an officer's conduct is irrelevant to the question of whether or not the officer is engaged in the performance of his official duties within the meaning of 18 USC § 111.[43]

The importance of the issue raised rests upon the fact that it tends to define the extent to which a private citizen may legitimately resist unlawful official conduct. Petitioner submits that the issue is one which should be clarified by this Court.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,
GERALD A. MESSERMAN

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42. 134 F.2d at 1010.

43. *Hodgdon vs. United States*, 365 F.2d 679 (8th Cir. 1966); *United States vs. Heliczer*, 373 F.2d 241 (2nd Cir. 1967), *cert. denied*, 388 U.S. 917.

APPENDIX

ORDER DENYING MOTION TO DISMISS INDICTMENT.

(Filed May 6, 1970.)

LAMBROS, *District Judge:*

The defendant moves to dismiss the two-count indictment upon the ground that the indictment fails to charge an offense cognizable under the law of the United States. The defendant was charged under 18 U.S.C. § 111 which reads as follows:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapons, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The defendant alleges that the two-count indictment is defective in that it fails to charge (1) that the defendant knew that the persons allegedly assaulted were officers of the United States and (2) that the defendant knew that the persons allegedly assaulted were engaged in the performance of their official duties at the time of the act charged. Referring to the above statute, one notes that the language of the statute does not include the requirement of knowledge or scienter. Nonetheless, the defendant avers that knowledge or scienter must be implied in the statute and in turn, must be charged in the indictment. The Court disagrees with the defendant.

Although there are cases to the contrary, the recent cases which have interpreted and applied 18 U.S.C. § 111

have held that knowledge or scienter are not required in order to charge a crime under the above statute. See *e.g., Burke v. United States,* 400 F.2d 866 (5th Cir. 1968); *McEwen v. United States,* 390 F.2d 47 (9th Cir. 1968); *United States v. Wallace,* 368 F.2d 537 (4th Cir. 1966). See also *McNabb v. United States,* 123 F.2d 848 (6th Cir. 1941); Annot., 10 A.L.R. 3d 833 (1966). The reason for the statute was amply explained in the case of *United States v. Wallace, supra.* There, the Court stated:

> "Early in the history of this country, the Congress found it necessary to grant customs collectors and others the right to remove state prosecutions against them arising out of the performance of their official duties to a federal court for trial there. It was but a corollary of such statutes that the antecedents of §§ 111 and 1114 were enacted to assure that those who unlawfully attacked or interfered with federal officials engaged in their official duties were triable in a federal court and were not left to the possibly grave uncertainties of retribution in a state court in which the juries might be quite unsympathetic to the federal purpose." 368 F.2d at 538-39.

More important for purposes of this motion is the rationale for not requiring knowledge or scienter as an element of the offense under 18 U.S.C. § 111. As succinctly expressed in the case of *McEwen v. United States, supra:*

> "(1) 'The courts should not by judicial legislation change the statute by adding, in effect, the words 'with knowledge that such person is a federal officer' [to its provisions]', [citing United States v. Lombardozzi, 335 F.2d 414, 416 (2d Cir. 1964)] . . . and (2) the common law rule that scienter was a necessary element in the indictment and proof of every crime has been modified with respect to statutes, the purpose of which would be obstructed by such requirement." 390 F.2d at 50.

The Court finds the above rationale quite persuasive.

Therefore, for the foregoing reasons, the Court denies the motion to dismiss the indictment of the defendent William Kiraly.

IT IS SO ORDERED.

THOMAS D. LAMBROS,
United States District Judge.

* * * * *

MEMORANDUM OPINION AND ORDER.

(Filed September 29, 1970.)

LAMBROS, *District Judge:*

On July 1, 1970, the defendant was found guilty of a violation of 18 U.S.C. § 111. At that time, the Court imposed a three year sentence upon this finding but deferred the execution of the sentence until a medical report as to the defendant's physical condition was submitted. Later, the defendant moved for a new trial alleging eight grounds in support thereof. On September 24, 1970 the Court heard arguments in open court in regard to the defendant's motion for a new trial.

Upon consideration of the motion of the defendant for a new trial, the Court denies the motion. The Court in an order issued before trial ruled on grounds one and two of the defendant's motion for a new trial. The Court finds that its ruling should not be disturbed. The case of *United States v. Rybicki,* 403 F.2d 599 (6th Cir. 1968) is not applicable to the present case. The Court finds that the case of *United States v. Rybicki* should be limited to its facts and is distinguishable from the present case. The remaining grounds of the defendant in support of his motion are also not well taken.

Accordingly, the motion of the defendant for a new trial is hereby denied.

IT IS SO ORDERED.

THOMAS D. LAMBROS,
United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING CONVICTION

(Decided and Filed July 14, 1971.)

Before: EDWARDS, CELEBREZZE and BROOKS, Circuit Judges.

PER CURIAM. Appellant appeals from a jury verdict of guilty and a sentence of three years which was subsequently suspended in favor of five years probation. Appellant had been indicted for and convicted of violating 18 U.S.C. § 111 (1964) which prohibits assaulting or interfering with a federal officer in the performance of his duties. The same jury found appellant not guilty under another count alleging violation of the same statute.

Appellant presents a number of issues, the most substantial of which represent claims that the District Judge committed reversible error by failing to recognize that government proof of scienter was an essential element of the crime charged, and by failing to give appellant's requested charge concerning trespassing.

The statute herein involved does not on its face require proof of scienter as an element of the crime. *McNabb* v. *United States*, 123 F.2d 848 (6th Cir. 1941). Inspection of this record convinces this court that there were no special facts requiring proof of scienter in this case. *Cf. United States* v. *Rybicki*, 403 F.2d 599 (6th Cir. 1968). And in any event, there was ample testimony, including that of appellant himself, that the FBI Agents identified themselves not only orally but by producing and showing their identification cards before the events which led to the instant charge.

As to appellant's trespass claims, we have read appellant's proffered charge and the charge as given by the

District Judge and find no reversible error in the charge as given when taken as a whole.

The only other appellate issue of possible substance is appellant's claim that his pretrial motion for suppression of any reference to appellant's prior felony convictions in the event appellant took the stand should have been granted, and that the District Judge's failure to do so constituted reversible error. Actually, appellant testified and on direct examination his own counsel elicited the facts which he claims the trial judge should have suppressed. Under established rules of this circuit, the felony convictions were admissible. *United States* v. *Wade*, 364 F.2d 931 (6th Cir. 1966).

And, in any event, we find no abuse of discretion (*See United States* v. *Palumbo*, 401 F.2d 270 (2nd Cir. 1968)) in the District Judge's ruling which could be held to be reversible error under the total facts of this case.

The judgment of the District Court is affirmed.

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No. 71-225

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM KIRALY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1971. On August 13, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether knowledge of a federal agent's status is an element of the offense under 18 U.S.C. 111.

2. Whether evidence of a prior felony conviction

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may be admitted against a defendant after he takes the stand.

3. Whether failure to transcribe the grand jury proceedings was error.

4. Whether the trial judge should have instructed the jury that the agents could not have been involved in their official duties if they were trespassing.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of assaulting two F.B.I. agents with a deadly weapon in violation of 18 U.S.C. 111. He was sentenced to a suspended three-year prison term and placed on five years' probation. The court of appeals affirmed *per curiam* (Pet. 24–25).

The facts adduced at trial showed that on October 1, 1968, two F.B.I. agents went to petitioner's house in connection with an investigation of one George Wells (Tr. 37, 172). They knocked on the side door and when petitioner's wife answered they introduced themselves to her as F.B.I. agents, showing her their credentials, and asked if her husband was home (Tr. 40, 174). She invited them in and informed them that her husband was inside (Tr. 40, 175). She then told petitioner that some F.B.I. agents were there to see him, and they introduced themselves and showed their credentials (Tr. 41–42, 175-176, 395, 465). In addition, one of the agents advised petitioner of his constitutional rights (Tr. 42, 178–179). When the agents attempted to interview petitioner he became angry and told them that the interview was over (Tr. 182). As

the agents closed up their brief cases and headed toward the door through which they had entered, petitioner said "I'll get something to get you the hell out of here" (Tr. 44, 183). He then went to a cabinet and pulled out a pistol (Tr. 46, 185). One of the agents quickly drew his gun and told petitioner to "drop that gun" which he did (Tr. 186). Inspection of the gun showed it was loaded and in firing condition (Tr. 194–196).

ARGUMENT

1. Petitioner contends that proof of knowledge that the person assaulted is a federal officer is a necessary element of a conviction under 18 U.S.C. 111. Although, as petitioner points out, there are some old cases taking this view, *e.g., Hargett* v. *United States,* 183 F. 2d 859 (C.A. 5), it is now well settled that such knowledge is not an element of the offense. *E.g., United States* v. *Marcello,* 423 F. 2d 993 (C.A. 5), certiorari denied, 398 U.S. 959; *United States* v. *Kartman,* 417 F. 2d 893 (C.A. 9); *United States* v. *Wallace,* 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Montanaro,* 362 F. 2d 527 (C.A. 2), certiorari denied, 385 U.S. 920.

In any event, the evidence here was ample that petitioner well knew the identity of the agents since they had introduced themselves and interviewed him for some time before he drew the gun (Tr. 41–42, 175–176, 395, 465).

2. Petitioner contends that the trial judge's ruling that his prior felony convictions could be used against

him if he took the stand was error.[1] It is well settled that such convictions are admissible for impeachment. *United States* v. *Sanders*, 412 F. 2d 854 (C.A. 5); *Nutter* v. *United States*, 412 F. 2d 178 (C.A. 9), certiorari denied, 397 U.S. 927; *United States* v. *Cacchillo*, 416 F. 2d 231 (C.A. 2); *United States* v. *Menk*, 406 F. 2d 124 (C.A. 7), certiorari denied, 395 U.S. 946; *Montgomery* v. *United States*, 403 F. 2d 605 (C.A. 8), certiorari denied, 396 U.S. 859. The fact that the convictions occurred thirty years ago, which was brought to the jury's attention (Tr. 381), did not render them inadmissible. *United States* v. *Palumbo*, 401 F. 2d 270 (C.A. 2), certiorari denied, 394 U.S. 947. We note, moreover, that the government never mentioned these convictions other than to correct petitioner's misstatement of the offenses of which he had been convicted (Tr. 443–444).

3. Petitioner's contention that the government erred in not transcribing the grand jury proceedings is without merit. The Federal Rules of Criminal Procedure do not require the recording of grand jury proceedings and no court has held that recording is constitutionally required. See *United States* v. *Kind*, 433 F. 2d. 339 (C.A. 4); *Baker* v. *United States*, 412 F. 2d 1069, 1073 (C.A. 5), certiorari denied, 396 U.S. 1018; *Loux* v. *United States*, 389 F. 2d 911, 916 (C.A. 9), certiorari denied, 393 U.S. 867.

Furthermore petitioner made no showing of any particularized need for the grand jury testimony of

[1] Petitioner took the stand and these convictions (for breaking and entering and armed robbery) were brought out on direct examination (Tr. 381, 443–444).

the F.B.I. agents who had made previous Jencks Act statements which were furnished to petitioner's counsel and used by him at trial (Tr. 201).

4. Petitioner contends that if the agents were trespassing at the time of the offense then they were not engaged in their official duties within the terms of the statute. Since the agents were invited into the house (Tr. 40, 175) and were in the act of leaving after an official interview (Tr. 43–44, 182–183, 404–405), the trespassing issue is not presented. In any event, the fact that agents may be acting in violation of the law does not establish that they are not in performance of their official duties. See *United States* v. *Sterling*, 369 F. 2d 799 (C.A. 3); *Hodgdon* v. *United States*, 365 F. 2d 679 (C.A. 8), certiorari denied, 385 U.S. 1029; *Hall* v. *United States*, 222 F. 2d 107 (C.A. 4); *Arwood* v. *United States*, 134 F. 2d 1007 (C.A. 6), certiorari denied, 319 U.S. 776.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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